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No. 84

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1984

Commonwealth of Pennsylvania
Bureau of Correction

Petitioner

v.

UNITED STATES MARSHALS SERVICE, RICHARD GARLAND JOSEPH A. SULLIVAN, Sheriff, DEPUTY SHERIFF SAULL, DEPUTY SHERIFF RODRIZGAS, DAVID OWHES (DIRECTOR OF INMATE SERVICES), THOMAS KELLY (WARDEN HOLMESBURG PRISON), GUARD BERSANE. GUARD HANNAH, GUARD OCEHSLE, DEPUTY SHERIFF JOHN DOE, DEPUTY SHERIFF JOHN DOE, DEPUTY SHERIFF JOHN DOE, SHERIFF JOHN DOE, DEPUTY SHERIFF JOHN DOE,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Whether a district court has the authority to direct the United States Marshal's Service to share responsibility with state officials for the production of state inmates to appear in federal district court for the trial of a civil action in which neither the state nor its officials is a party.

TABLE OF PARTIES

The caption of this case in the Court of Appeals for the Third Circuit is as follows:

RICHARD GARLAND

v.

JOSEPH A. SULLIVAN, Sheriff, DEPUTY SHERIFF SAULL, DEPUTY SHERIFF RODRIZGAS, DAVID OWHES (DIRECTOR OF INMATE SERVICES), THOMAS KELLY (WARDEN HOLMESBURG PRISON), GUARD BERSANE, GUARD HANNAH, GUARD OCEHSLE, DEPUTY SHERIFF JOHN DOE, DEPUTY SHERIFF JOHN DOE, DEPUTY SHERIFF JOHN DOE, SHERIFF JOHN DOE, DEPUTY SHERIFF JOHN DOE,

United States Marshals Service,

Intervenor-Appellant

Commonwealth of Pennsylvania,
Bureau of Correction

Intervenor-Appellee

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IN THE SUPREME COURT OF THE
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v.

UNITED STATES MARSHALS SERVICE, RICHARD GARLAND JOSEPH A. SULLIVAN, Sheriff, DEPUTY SHERIFF SAULL, DEPUTY SHERIFF RODRIZGAS, DAVID OWHES (DIRECTOR OF INMATE SERVICES), THOMAS KELLY (WARDEN HOLMESBURG PRISON), GUARD BERSANE. GUARD HANNAH, GUARD OCEHSLE, DEPUTY SHERIFF JOHN DOE, DEPUTY SHERIFF JOHN DOE, DEPUTY SHERIFF JOHN DOE, SHERIFF JOHN DOE, DEPUTY SHERIFF JOHN DOE,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

The Attorney General of the Commonwealth of Pennsylvania, on behalf of the Commonwealth of Pennsylvania, Bureau of Correction, hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 4a - 45a) and is reported at 737 F.2d 1283. The memorandum and order of the magistrate (App. 46a - 65a) is not reported.

JURISDICTION

The judgment of the court of Appeals (app. 1a - 3a) was entered June 27, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

1. The All Writs Act, 28 U.S.C. §1651(a), provides:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

2. 28 U.S.C. § 2241, provides in pertinent part:

(c) The writ of habeas corpus shall not extend to a prisoner unless --

(5) It is necessary to bring him into court to testify or for trial.

3. 28 U.S.C. §2243 provides in pertinent part:

The writ ... shall be directed to the person having custody of the person detained.

* * *

[The] person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.

4. 28 U.S.C. §567:

Under regulations prescribed by the Attorney General, each United States Marshal shall be allowed --

* * *

(2) the expense of transporting prisoners, including the cost of necessary guards and the travel and subsistence expenses of prisoners and guards ...

5. 28 U.S.C. §569:

(a) The United States marshal of each district is the marshal of the district court .... and may, in the discretion of the respective courts, be required to attend any session of court.

(b) United States marshals shall execute all lawful writs, process and orders issued under authority of the United States, ... and command all necessary assistance to execute their duties.

STATEMENT OF THE CASE

This action began when a prisoner,[1] Richard Garland, brought a civil rights suit pursuant to 42 U.S.C. §1983 against various Philadelphia County officials alleging that these defendants had violated his rights by beating and harassing him. The matter was referred to a magistrate for disposition on the merits pursuant to 28 U.S.C. §636(c)(1). In the course of the proceedings, on February 8, 1983, the magistrate ordered the superintendents of various state prisons to transport the plaintiff-inmate and four inmate witnesses to the county prison nearest to the United States Court-

[1]Plaintiff, Garland, was confined in a Philadelphia County jail when he initiated the lawsuit; however, at all times relevant to the issues raised in this petition, he was in custody of the Pennsylvania Bureau of Correction at its institution at Huntingdon, Pennsylvania.

house in Philadelphia. In the same order, the magistrate further directed the United States Marshal [hereinafter "marshal"] to transport the inmates from the county jail to the federal court and to maintain custody over these inmates for the duration of the trial.

The marshal, an intervenor in the action,[2] moved for reconsideration of that portion of the magistrate's order which apportioned to it the responsibility of transporting the prisoner-witnesses from the county jail to the federal courthouse and, thereafter, to maintain custody during trial. The marshal's motion for reconsideration was denied

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[2]On April 20, 1983, intervenor status was granted to the Commonwealth of Pennsylvania, Bureau of Corrections and to the marshal, nunc pro tunc as of May 7, 1982 and January 19, 1983 respectively.

and the marshal appealed.[3] The Third Circuit Court of Appeals held that the district court, and therefore the magistrate, has the statutory authority to direct the marshal to maintain custody over a state prisoner-witness in the federal courthouse, but that the court lacks authority to direct the marshal to transport that prisoner between the county jail and the federal courthouse.

In the lead opinion by Judge Gibbons, the court of appeals began its analysis of the issue by focusing on the source of judicial authority to issue writs, process and orders. It pointed out that 28 U.S.C. §569(b), relied upon by the magistrate, is merely a directive to the marshal to execute

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[3]The subject of the appeal is entirely collateral to the underlying action, disposing of the transportation issue fully and finally. Review of final orders in cases tried before a magistrate by consent of the parties lies with the court of appeals. 28 U.S.C.§636(c)(3).

writs when these have been issued pursuant to some other authority. The court then turned to the All Writs Act, 28 U.S.C. §1651, to determine whether this statute authorizes a district court to order the marshal to assume transportation responsibility for state inmates. The court did not find such authority in the language of the All Writs Act, holding instead, that the magistrate's order was, in fact a writ of habeas corpus ad testificandum properly addressed to the custodian, with a mandamus added to it. The court then concluded that the mandamus order was inappropriate, relying upon McIntire v. Wood, 11 U.S. [7 Cranch] 504 (1813) and McClung v. Silliman, 19 U.S. [6 Wheat.] 268 (1821). Judge Gibbons did conclude, however, that the magistrate properly ordered the marshal to maintain custody of the prisoners while they are in the federal courthouse.

Judge Becker, concurring as to the courthouse custody issue and concurring in the judgment, expressed some serious bewilderment with McIntire and McClung. He noted that the result here undercut the flexibility which should be accorded to district courts to deal with problems of this nature and might discourage the courts from ordering the production of prisoners to testify.

Judge Atkins dissented in part, concluding that the magistrate's order was proper in every respect.

REASONS FOR GRANTING THE WRIT

This case presents important issues concerning the flexibility which district courts have to tailor their orders in such a way as to insure that justice is done while, at the same time, fairly distributing the responsibility and cost between the state and federal governments. Because the court of appeals' decision conflicts with the prior decisions of this Court, and with those of other courts of appeals, the Court should grant review.

1. The court of appeals read McIntire v. Wood, 11 U.S. [7 Cranch] 504 (1813) and McClung v. Silliman, 19 U.S. [6 Wheat.] 598 (1821) as precluding reliance upon the All Writs Act, 28 U.S.C. §1651, for an order in the nature of a mandamus against federal officials. But McIntire held only that a mandamus

could not issue because the circuit courts had not been vested by Congress with jurisdiction to decide the types of claims at issue in that case (i.e., the right to a land patent). In fact, the Court adverted to the availability of mandamus in a proper case, noting that

> [h]ad the 11th section of the judiciary act covered the whole ground of the constitution, there would be much reason for exercising this power in many cases wherein some ministerial act is necessary to the completion of an individual right arising under the laws of the United States, and the 14th section of the same act [the predecessor of 28 U.S.C. §1651] would sanction the issuing of the writ for such a purpose.

11 U.S. [7 Cranch] at 506.

McClung v. Silliman, 19 U.S. [6 Wheat.] 598 (1821), the other case relied upon by Judge Gibbons (and the case which so troubled Judge Becker) likewise does not support the decision of the court of appeals. Although McClung is admittedly somewhat hard to follow, its essence is

the Court's conclusion that no authority could be found for the proposition that a state tribunal had jurisdiction to issue a writ of mandamus against a federal official; such authority certainly could not be lightly inferred when Congress had refused to delegate the power to the federal courts. Id. at 604. As the Court later had occasion to observe, "[T]he only question directly before the court [in McClung], was, whether a state court had authority to issue a mandamus to an officer of the United States, and this power was denied." Kendall v. United States ex rel. Stokes, 37 U.S. (12 Pet.) 524, 617 (1838).[4] As such,

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[4]Even if the court of appeals correctly interpreted McIntire and McClung, a great deal has changed since those decisions. The federal trial courts now have general federal question

FOOTNOTE CONTINUED ON NEXT PAGE

McClung is a case resting on the sovereign immunity of federal officials which protects them from litigation in state courts.

Contrary to the court of appeals' conclusion, this Court repeatedly has interpreted the All Writs Act to confer on the federal courts broad and flexible powers to aid in the exercise of their jurisdiction. See, e.g., United States v. New York Telephone Co., 434 U.S. 159, 172-173 (1977); Adams v. United States ex rel. McCann, 317 U.S. 269, 273 (1942).

FOOTNOTE 4 CONTINUED

jurisdiction, 28 U.S.C. §1331, and the district courts have specific statutory authority to issue writs of mandamus to federal officers and employes, 28 U.S.C. §1361. If anything, McIntire and McClung today stand only for the proposition that the All Writs Act permits federal, but perhaps not state, courts to issue writs in the nature of mandamus against federal officials if the case otherwise is within the court's jurisdiction.

This flexibility is no better illustrated than by the Court's many decisions permitting resort to the All Writs Act to supply necessary procedural devices not recognized as traditional components of the writ of habeas corpus. See Harris v. Nelson, 394 U.S. 287 (1969) (All Writs Act permits district courts to issue discovery orders in habeas corpus proceeding despite absence of authorization for such orders in the habeas corpus statutes); United States v. Hayman, 342 U.S. 205 (1952) (All Writs Act authorizes district court to issue order for production of prisoner to testify at hearing on claim under 28 U.S.C. §2255); Price v. Johnston, 334 U.S. 266 (1948) (All Writs Act permits court of appeals to issue a writ ordering that a prisoner be produced in court to argue his appeal from denial of a writ of habeas corpus). So too here, the All Writs Act may supply the

necessary procedural device to accomplish the transfer of custody from state to federal officials despite the fact that the traditional writ of habeas corpus only may be directed to the custodian. See 28 U.S.C. § 2243.

In the final analysis, the court of appeals has too narrowly confined the district courts' ability to fashion procedural devices to meet the exigencies of the case at hand. The court's conclusion conflicts directly with this Court's determination that the federal courts have the authority when "appropriate" (although, perhaps, not strictly necessary), to utilize procedural devices "to achieve the ends of justice ...." Adams v. United States ex rel McCann, supra, 317 U.S., at 273. There is no question here that the district court, unlike the lower courts in McIntire and McClung, had jurisdiction over the case;

clearly its orders were in aid of that jurisdiction as contemplated by 28 U.S.C. § 1651. Accordingly, the court of appeals erred in applying a blanket rule that the orders directed to the marshal were without authority. Ibid. The importance of this issue to all state and local custodians of prisoners merits this Court's review.

2. As all members of the court of appeals panel correctly observed (App. 13a - 14a, 44a, 45a), the decision in this case conflicts with the decisions in four other circuits. In Ford v. Allen, 728 F.2d 1369 (11th Cir. 1984), the court upheld a district court order requiring the marshal to transport a state prisoner to testify in federal court. The Fifth Circuit has approved an order precisely like the one at issue here; the state authorities were required to transport the prisoner to the county jail nearest

the federal courthouse and the marshal had the duty to produce the prisoner in court. Ballard v. Spradley, 557 F.2d 476 (5th Cir. 1977). In Ford v. Carballo, 557 F.2d 404 (7th Cir. 1977) the court held that the marshal can be ordered to reimburse state officials for the cost of transporting a state prisoner to federal court pursuant to a writ addressed both to the marshal and the state prison warden. See also Wiggens v. County of Alameda, 717 F.2d 466 (9th Cir. 1983), cert. denied sub nom. California Department of Corrections v. United States, No. 83-634 (Feb. 27, 1984) (upholding a district court order requiring state officials to bear the entire cost of producing a prisoner in state court, but holding that the allocation of responsibility for producing state prisoners between the marshal and state authorities rests

within the sound discretion of the district court).

The flurry of recent decisions noted above on the question of the district court's authority to order that federal and state officials share the task of producing state prisoners in federal court is a reflection of the increasing number of habeas corpus actions and prisoners' civil rights suits. The issue of who shall bear the responsibility for and cost of producing these prisoners in court is of tremendous importance to state corrections officials. The conflicting decisions of the courts of appeals and the seriousness of the issue merits this Court's attention.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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A P P E N D I X

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-1283

GARLAND, RICHARD

vs.

SULLIVAN, JOSEPH A., SHERIFF, DEPUTY SHERIFF SAULL, DEPUTY SHERIFF RODRIZGAS, DAVID OWHES (DIRECTOR OF INMATE SERVICES), THOMAS KELLY (WARDEN HOLMESBURG PRISON), GUARD BERSANE, GUARD HANNAH, GUARD OCEHSLE, DEPUTY SHERIFF JOHN DOE, DEPUTY SHERIFF JOHN DOE, DEPUTY SHERIFF JOHN DOE, DEPUTY SHERIFF JOHN DOE, DEPUTY SHERIFF JOHN DOE, DEPUTY SHERIFF JOHN DOE, COMMONWEALTH OF PENNSYLVANIA,
UNITED STATES MARSHALS SERVICE,
Appellant

(D.C. Civil No. 80-2350)
ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: GIBBONS and BECKER, Circuit Judges and ATKINS, District Judge*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District

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*Honorable C. Clyde Atkins, United States District Judge for the Southern District of Florida, sitting by designation.

of Pennsylvania and was argued by counsel January 23, 1984.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered December 9, 1982, be, and the same is hereby as made final by its orders entered February 11, and February 17, and February 22, 1983, be, and the same is hereby affirmed insofar as it requires the Marshal of the District Court to take into custody while in the federal courthouse state prisoner witnesses whose presence is required for testimony in civil proceedings in the federal court but is reversed insofar as, without a finding of special security circumstances, it required the Marshal to transport those witnesses between the county jail and the federal courthouse. All the above in accordance with the opinion of this Court.

ATTEST

Clerk

June 27, 1984

Certified as a true copy and issued in lieu of a formal mandate on July 19, 1984.
Test:
Chief Deputy Clerk, U.S. Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-1283

RICHARD GARLAND

v.

JOSEPH A. SULLIVAN, Sheriff, DEPUTY SHERIFF' SAULL, DEPUTY SHERIFF RODRIZGAS, DAVID OWHES (DIRECTOR OF INMATE SERVICES), THOMAS KELLY (WARDEN HOLMESBURG PRISON), GUARD BERSANE, GUARD HANNAH, GUARD OCEHSLE, DEPUTY SHERIFF JOHN DOE, DEPUTY SHERIFF JOHN DOE, DEPUTY SHERIFF JOHN DOE

United States Marshals Service,

Appellant

(D.C. Civil No. 80-2350

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued: January 23, 1984
BEFORE: GIBBONS and BECKER, Circuit Judges and ATKINS, District Judge*

(Opinion Filed: June 27, 1984)

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*Hon. C. Clyde Atkins, United States District Judge for the Southern District of Florida, sitting by designation.

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OPINION ANNOUNCING
THE JUDGMENT OF THE COURT

GIBBONS, Circuit Judge:

The United States Marshals Service, an intervenor, appeals from an order of a United States Magistrate in a pending civil action, denying the intervenors' motion for reconsideration of an order directing the United States Marshal for the Eastern District of Pennsylvania to transport a state prisoner witness from the nearest county jail to the United States Courthouse in Philadelphia and to maintain custody of that prisoner while he is in the federal courthouse. The underlying civil action is within the subject matter jurisdiction of the district court, and is assigned for trial

before a United States Magistrate by consent of the parties. 28 U.S.C. § 636(c)(1). The Marshals Service contends that the district court, and hance the United States Magistrate, lacked statutory authority to enter the order appealed from. The Bureau of Corrections, Commonwealth of Pennsylvania, the Sheriff of Philadelphia County, and the City of Philadelphia, which have also intervened, defend the order. We hold that the district court, and thus the magistrate, has statutory authority to direct the United States Marshal to maintain custody of a state prisoner witness in the federal courthouse while he is there in connection with judicial proceedings, but lacks such authority to direct the Marshal to transport that prisoner between the county jail and the federal courthouse.

I.

Appealability

This dispute, between the United States Marshals Service and the Pennsylvania corrections officials as to who must bear the expense of transporting and maintaining secure custody over state prisoners required as witnesses in civil proceedings in the federal courts, is entirely collateral to the underlying action. The Magistrate's order disposes of the dispute fully and finally. Review of final orders in cases tried by consent of the parties before United States Magistrates lies directly to this court.[1] 28 U.S.C. § 636(c)(3).

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[1] Siers v. Morrash, 700 F.2d 113 (3d Cir. 1983), does not hold otherwise. That case did not involve a case tried before a United States Magistrate by consent of the parties. 700 F.2d at 116 n.10, and the appeal was therefore brought under 28 U.S.C. § 1291, not under 28 U.S.C. § 636(c)(3).

Thus we have appellate jurisdiction. Story v. Robinson, 689 F.2d 1176, 1177 (3d Cir. 1982).

II.

The Merits

At issue in this appeal is the authority of a United States District Court to shift the burden of expense in responding to unquestionably lawful federal civil process from the Commonwealth of Pennsylvania to the United States Treasury. The Commonwealth understandably prefers that federal taxpayers bear that burden, and since the United States is often seen as the ultimate deep pocket target, that preference has a plausible appeal. But the United States has not conferred on the federal judiciary any authority to lay hands on its Treasury. To the contrary, the Constitution provides that

"[n]o Money shall be drawn from the Treasury, but in Consequence of appropriations made by Law . . . ." Art. I, Sec 9, cl. 7. Absent statutory authorization, what the Commonwealth proposes is a raid in its interest on the United States Treasury.

A.

Transportation

This court has dealt with the contention advanced on behalf of the Commonwealth, the County and the City in the recent past. In Story v. Robinson, 689 F.2d 1176 (3d Cir. 1982), the Commonwealth and Allegheny County appealed, as intervenors, from a writ of habeas corpus ad testificandum directing that state prisoner witnesses be transported from state prisons to a county jail near the federal courthouse in Pittsburgh. The Commonwealth objected

to transporting the prisoners without reimbursement by the United States, and urged on us several statutes which might authorize the district court to qualify the writ by a reimbursement condition. The first statute relied upon was 28 U.S.C. § 569(b), which instructs the Marshals to "execute all lawful writs, process and orders executed under the authority of the United States . . . ." We held that this statute was not a separate source of judicial authority to issue writs, process and orders, but only a source of the Marshals' duty to execute them when they have been issued pursuant to some other source of authority. 689 F.2d at 1179. A second statute was 28 U.S.C. § 571, which authorizes the United States Marshal to act as disbursing officer for the United States Attorney and for federal court personnel. We held that this statute

conferred no authority to relieve state custodians of the financial burden of complying with federal process. 689 F.2d at 1179. A third statute relied on by the Commonwealth was 28 U.S.C. § 567(2), which provides that each United States Marshal shall be allowed "the expense of transporting prisoners. . . ." We held that this statute was no authority, at least absent some intergovernmental agreement, see 28 C.F.R. § 0.111(j)(1983), for relieving the Commonwealth of such expense. Id. Finally, the Commonwealth relied on 28 U.S.C. § 1651. We rejected the Commonwealth's contention that this statute required the grant of the motion to impose the entire cost of compliance with the writs of habeas corpus ad testificandum on someone other than the state custodian. 689 F.2d at 1180.

In the instant case neither in the district court nor before this court did the Commonwealth and its subdivisions rely upon section 1651 as authority for an order directed to the United States Marshal.[2] Technically, the question is open, for while Story v. Robinson rejected the contention that section 1651

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[2]The Magistrate relied on 28 U.S.C. § 569 which authorizes the Marshals to "attend any session of court . . ." when ordered by the district judge to do so, and to "execute all lawful writs . . . issued under the authority of the United States."

The Marshals Service has not fared well in the other circuits that have considered this issue. In Ballard v. Spradley, 557 F.2d 476 (5th Cir. 1977), the Fifth Circuit upheld a cost-sitting order by the district court. It held that the district court had the power to issue such a writ under 28 U.S.C. § 2241 and that the Marshal was obligated to obey under 28 U.S.C. § 569. The precedent was applied to an order allocating full responsibility to the Marshal in Ford v. Allen, 728 F.2d 1369 (11th Cir. 1984). In Ford v. Carballo, 577 F.2d 404

FOOTNOTE CONTINUED ON NEXT PAGE

required an order that the cost of producing prisoner witnesses must be assumed by the Marshals Service, it did not decide whether the section nevertheless authorized such an order as a matter

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FOOTNOTE CONTINUED

(7th Cir. 1978), the Seventh Circuit held that under the All Writs Act, 28 U.S.C. § 1651, the district court abused its discretion when it failed to order the Marshals Service to reimburse a state for the cost of transporting and producing a plaintiff prisoner in a habeas proceeding. Finally, in Wiggins v. County of Alameda, 717 F.2d 466 (9th Cir. 1983), cert. denied, 104 S.Ct. 1425, the Ninth Circuit held in dicta that "a district court judge has the discretion to allocate the costs of compliance with a writ ad testificandum in any number of combinations . . . [including] the clearly preferable sharing of costs approved in Ballard and Story as well as imposing full costs on the United States, see 28 U.S.C. §567(2). 569(b). . ." The court disagreed, however, with Ballard's holding that the Marshals Service could be ordered to reimburse the state for the costs of transportation. It also disapproved of Ford v. Carballo's use of the All Writs Act instead of the separate grant of habeas power contained in 28 U.S.C. § 2241.

of discretion. No party has briefed that question, but since such a construction of section [65] might arguably justify the order appealed from, we address it.

A construction of the All Writs Act as a grant of authority to transfer to the United States Treasury the expense of compliance with witness process is unsupportable. None of the authorities construing section 1651 interpret it as a grant of authority for the issuance of an order compelling a non-party Executive branch officer to satisfy the obligation of state custodians to respond to witness process. United States v. New York Telephone Co., 434 U.S. 159 (1977), on which the Commonwealth relied in Story v. Robinson, supra. involves the authority of the district court to direct process to non-parties who are so situated that their cooperation is essential to the exercise of its

jurisdiction otherwise attaching. The Marshal clearly is not so situated. The only cooperation necessary to the exercise of the district court's jurisdiction over pending civil or criminal cases is that of the custodian of needed witnesses.[3]

In McIntire v. Wood, 11 U.S. [7 Cranch] 502 (1813), the Court held that section 14 of the Judiciary Act of 1789, from which section 1651(a) is derived, was not a source of substantive authority to mandamus federal executive branch officers. Cf. McClung v. Silliman, 19 U.S. [6 Wheat.] 268 (1821) (state court cannot mandamus federal officer).

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[3]Similarly, Application of the United States of America, 610 F.2d 1148 (3d Cir. 1979), which upheld an order directing telephone companies to cooperate in tracing certain telephone calls, is distinguishable from the case before us because the cooperation of the companies was essential to the execution of the tracing order.

Compare Pub. L. No. 87-748, § 1(a), 76 Stat. 744 (1972), codified at 28 U.S.C. § 1361 (1976) ("Action to compel an officer of the United States to perform his duty"). Since the Marshals are not custodians, they are nct appropriate respondents to writs of habeas corpus. Orders directing them to assume the burden of compliance are therefore in the nature of mandamus. Thus the definitive construction of the All Writs Act in McIntire v. Wood precludes reliance on that statute.

Any other interpretation of sectior 1651 would permit district courts to impose the expenses of litigation upon the Treasury of the United States whenever that seemed to the court to be a good idea. Both common sense and appropriate concern for separation of powers caution against such an arrogation of judicial power. Certainly

section 1651 authorizes writs in aid of the district court's jurisdiction otherwise obtaining. Thus, as we held in Story v. Robinson, it authorizes writs of habeas corpus ad testificandum directed to custodians. But it is a long leap from authority to compel custodians to produce witnesses necessary for the exercise of jurisdiction, to authority to compel non-custodians to bear the expense of that production simply because they have access to a deeper pocket.

B.

Courthouse Security

Custody of state prisoners in the United States Courthouse presents a separate issue, because courthouse security is involved. A federal statute provides that "[t]he United States Marshal of each district is the marshal

of the district court. . .and may, in the discretion of the respective courts, be required to attend any session of court." 28 U.S.C. § 569(a). Addressing that provision, we observed in Story v. Robinson:

> This statute quite clearly authorizes the district court to require the attendance of the Marshal at any judicial proceeding, including any proceeding at which the testimony of a state prisoner may be required. It seems plain, then, that the court has authority to direct the marshal to take prisoners into custody during the time their attendance at court is required.

689 F.2d at 1180. The Marshals Service acknowledges that this section of the statute makes the Marshals responsible for courthouse security, and that funds are appropriated for that purpose, but urges that absent some finding of a security risk, it should not be construed to relieve the state custodians of the duty to produce their prisoner witnesses and maintain them in secure custody.

We hold that section 569(a) authorizes federal trial courts,[4] in the interest of security and flexibility, to require the Marshal of the district to take custody of state prisoner witnesses while they are in a federal courthouse for purposes of testimony. Requiring an individualized "special security risk" finding would be completely impractical. The development of a record for such findings is beyond the capabilities of the litigants for whose lawsuits the prisoner witnesses are needed. Because of the critical need for courtroom security this case presents one of those rare instances in which the trial courts must be recognized as having virtually unreviewable discretion. Nor is the alternative of depen-

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[4]The Marshals Service does not contend that Magistrates have less authority under section 569(a) than do district judges.

ding on state corrections officers for the maintenance of security within federal courthouses a viable alternative. Since 1789 the United States has depended upon its own marshals for the security of its own court facilities, and few if any federal judges would be comfortable with any other arrangement.

The provision of the order requiring that the Marshal of the District Court transport prisoners between the county jail and the federal courthouse, however, presents a distinctly different issue. In Story v. Robinson we reserved the question "whether section 569(a) provides authority for a direction, in the interest of courthouse security, that prisoner witnesses be taken into custody at a point outside the courthouse." 689 F.2d at 1180. We did not intend to suggest that federal trial courts had

unlimited discretion to enter such orders. Obviously the security problem outside the courthouse is of an entirely different order of magnitude than that within. The presumption should be that there is no federal court security interest until state prisoners are delivered to the custody of the Marshal of the district at the federal courthouse Situations obviously can be imagined in which that presumption may be overcome; particularly dangerous or threatening prisoners, for example, or perhaps prisoner witnesses whose own safety may be at risk. But those situations are likely to be the exception. Thus we hold that unless a federal trial court makes a specific finding that special security circumstances exist which require an order that state prisoner witnesses be taken into the Marshal's custody at a situs away from the federal

courthouse, section 569(a) does not authorize such an order. There is no other authority for such an order.

III.

Conclusion

The order appealed from will be affirmed insofar as it requires the Marshal of the District Court to take into custody while in the federal courthouse state prisoner witnesses whose presence is required for testimony in civil proceedings in the federal court, but reversed insofar as, without a finding of special security circumstances, it required the Marshal to transport those witnesses between the county jail and the federal courthouse.

BECKER, Circuit Judge, concurring part[1] and concurring in the judgment.

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[1]I join only in Parts I and II.B. of Judge Gibbon's opinion.

The opinion announcing the judgment of the court proceeds along the following syllogism. A writ of habeas corpus ad testificandum requires the custodian to produce the prisoner at a trial. Since the magistrate in this case ordered federal marshals to deliver a prisoner of Pennsylvania to the federal courthouse, the order appealed from cannot be a writ of habeas corpus and testificandum but must instead be a writ in the nature of mandamus directed at the Marshal Service. But, continues the syllogism, under McIntire v. Wood, 11 U.S. (7 Cranch) 504 (1813), and McClung v. Silliman, 19 U.S. (6 Wheat.) 598 (1821), the All Writs Act does not authorize federal court to issue writs of mandamus against federal executive branch, and since neither 28 U.S.C. § 569(a) nor 28 U.S.C. § 569(b) (nor any other arguable provision) provides an

alternative source of authorization, the magistrate commmitted an error of law when he directed that the Marshals Service share responsibility for transporting state prisoners to federal court pursuant to a writ of habeas corpus ad testificandum.

With one exception,[2] I find each of the critical steps in this syllogism to be questionable. Moreover, having in mind the role of the Marshal as the executive arm of the court and the need to accord flexibility to trial judges if the judicial system is to function fairly, I believe that the consequence of the historic approach taken by Judge Gibbons' opinion is unfortunate. Ultimately, I cannot deny the analytic force of his opinion, and I

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[2]I agree that section 569(a) and 569(b) do not authorize the magistrate's directive in this case.

am thus constrained to concur in the judgment. Given the institutional importance of today's decision and the circuit split it creates, however, I believe it important to probe the weaknesses of the syllogism implicity relied upon, and to explain the problems of judicial administration likely to result from the failure to adapt the precedents of antiquity to the needs of a modern society, hence this separate opinion.

I. Analytic Problems

A. The Rigid View of Habeas Corpus Ad Testificandum

It is hornbook law that "[w]hen served with a writ of habeas corpus ad testificandum calling for the production as a witness of one lawfully restrained of his liberty, the sheriff, jailer, or other custodian of such person is bound

to bring him into court to give his testimony. . . ." 97 C.J.S. Witnesses §30 c (1957). It is similarly the ancient learning that "A prisoner produced in response to a writ of habeas corpus ad testificandum is still in custody and the court or commissioner issuing the writ has no power to authorize the custodian to suffer his prisoner to go at large pending the proceedings in which he is called to testify, or to take him from the custody of one officer and put him in another." Id. There is no provision anywhere in traditional authority that permits modifications of this writ to allow custody to be transferred to federal officials before the courthouse is reached. Thus, this segment of Judge Gibbons' syllogism is probably correct.

The rigidity with which habeas corpus ad testificandum is viewed,

however, rests in some tension with the flexible character of the All Writs Act, which has been held in three post-war cases to authorize the issuance of writs not precisely comporting than those of tradition. In Price v. Johnston, 334 U.S. 266, 282 (1948), Harris v. Nelson, 394 U.S. 286, 299 (1969), and United States v. New York Telephone Co., 434 U.S. 159, 171 (1977), the Court has repeatedly interpreted the All Writs Act to be a "legislatively approved source of procedural instruments designed to achieve the rational ends of the law." Moreover, as the Supreme Court stated in Price, "since 'law' is not a static concept, but expands and develops as new problems arise, . . . the forms of the habeas corpus writ authorized by [section 1651] are not only those recognized in this country in 1789, when the original Judiciary Act containing the substance

of this section came into existence. . . . Rather, it is a legislatively approved source of procedural instruments designed to achieve 'the rational ends of law.'" 334 U.S. at 282. This expansive language must give pause to any court seeking to circumscribe the discretion of a district court that seeks to fashion equitable procedures for assuring the presence of witnesses in proceedings before it.

More than the mere language of the cited cases might suggest the All Writs Act to provide a source for the directive issued by the magistrate in this case. In Price the issue was whether a federal appeals court had power to permit a state prisoner to come forward to argue his own appeal. Despite the absence of any traditional writ or express statutory provision authorizing release of a prisoner on these grounds, the Supreme Court held that section 1651

gave the appeals court such power. In Harris, a case much like this one in that the district court perceived a need for greater fact finding than other statutes would have allowed, the Supreme Court held that, despite the absence of specific statutory authority, the district court could issue a discovery order in connection with the habeas corpus proceeding before it. In New York Telephone, the Supreme Court affirmed an order of the district court directing a telephone operating company to assist the FBI in installing pen registers. After summarizing the case law noted above, the Supreme Court stated there that the All Writs Act empowers federal courts to issue orders to "persons who, though not parties to the original action or engaged in wrongdoing, are in a position to frustrate the implementation of a court

order or the proper administration of justice . . . and even encompasses those who have not taken any affirmative action to hinder justice." 434 U.S. at 174.

I suppose, however, that there is a difference between the creation of new writs to satisfy new needs and the expansion or modification of existing writs. With the latter, the traditional forms and doctrines may be said to express the limits of the writ. To rephrase the matter in statutory pariance. 28 U.S.C. § 2241(c)(5) (1982), which gives federal courts authority to issue writs of habeas corpus ad testificandum, may preclude reliance on 28 U.S.C. § 1651 (1982)(the All Writs Act in modern garb) to create processes that mimic section 2241 writs in most of their features but which speak with their own voice on several critical issues. Thus, I cannot quarrel too

much with a conclusion that the magistrate did not (and statutorily likely could not) issue a writ under 28 U.S.C. § 1651 directing the Marshals Service to share responsibility for transporting a state prisoner to federal court so that he might testify in civil proceedings. Instead, the magistrate issued a traditional writ of habeas corpus ad testificandum, and tagged on a writ, arguably in the nature of mandamus, directing the marshals to share responsibility for transport. The question then becomes, of course, whether the magistrate had authority to issue this supplemental writ.

B. The Ways of Denying Authority

The opinion announcing the judgment of the court relies on the hoary cases of McIntire v. Wood, 11 U.S. (7 Cranch) 504 (1813), and McClung v.

Silliman, 19 U.S. (6 Wheat.) 598 (1821), to reach the conclusion that the All Writs Act, 28 U.S.C. § 1651 (1976), does not authorize a writ of mandamus against a federal executive officer. While I ultimately agree with the opinion of Judge Gibbons on this point, I am not without serious doubts.

Standing alone, I do not think the cryptic opinion in McIntire v. Wood could support the result reached today. In that case, a person claiming to own land by virtue of a federal statute brought suit in federal court in order that the court might direct a land officer to perform various acts apparently needed to perfect title (or to bring suit to perfect title). There being no "arising under" jurisdiction as there is in modern federal practice, the Supreme Court held that the 11th Section of the Judiciary Act of 1789 did not permit the

suit to be brought in federal court. Generally put, that section vested the then-circuit courts with jurisdiction only over certain types of diversity and alienage cases, and cases in which the United States was the plaintiff or petitioner. Were we writing on a clean slate, we would say that the only comment McIntire made with respect to the All Writs Act was that it did not in and of itself create federal jurisdiction; though Congress might have granted jurisdiction to the federal courts in cases wherein performance by some federal officer was a precondition to enforcement of some federal entitlement, it had not done so in the All Writs Act.

It is only because of McClung v. Silliman and because of that case's interpretation of McIntire that I feel constrained to adhere to the judgment announced today by Judge Gibbons. In

that case, the same litigant who had not been permitted to sue in federal court in McIntire sued in state court and asked it to issue a writ of mandamus to the recalcitrant federal land officer. The state court believed it had the power to issue such a writ, but, on the merits, declined to do so. Because of this factual background, it would seem that the issue before the Supreme Court was essentially one of federalism: whether the state court had the power to issue orders to a federal executive official.

For reasons that are lost to antiquity the Supreme Court in McClung determined whether a federal court could issue such a writ in cases (such as the one before it) where diversity of citizenship existed. Unaided by consultation of McClung, I would have thought that a federal court could issue

such a writ under those circumstances; as I read McIntire, the problem was an absence of statutory jurisidiction, not some limitation on remedial powers. In McClung, however, the Supreme Court spoke to the contrary and stated (so far as I can discern) that, because there was no jurisdiction, a federal court of original jurisdiction could not issue a writ of mandamus against a federal official, even in cases where the parties were of diverse citizenship. Why there would be no jurisdiction in such a case is a mystery that perhaps only those deeply schooled in the mindset of that era could solve.[3]

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[3]I resist the temptation to interpret McClung against its historic background, i.e., the reluctance of the early Supreme Court to asset its powers against a hostile executive. Times have of course changed, and now the Mandamus Act, 28 U.S.C. §1361, has formalized the power of federal courts to mandamus inferior federal officers.

My bewilderment does not permit me to disregard what the Supreme Court has written, however. Thus, so long as I accept the assertion that the magistrate issued a writ of mandamus against the Marshals Service, and the notion that a marshal, like the land officer in McClung, is a member of the federal executive branch, then I must resign myself to the decision reached by Judge Gibbons.

C. The Status of the Marshals

Generally speaking, the United States Marshals serve as the executive arm of the federal judiciary and, since the Judiciary Act of 1789, have been obligated to execute all lawful "precepts" directed to them under the authority of the United States. As the Fifth and Eleventh Circuits have observed, "The raison d'etre if the

Marshal Service is to service the federal forum in civil as well as criminal litigation." Ford v. Allen, 728 F.2d 1369, 1370 (11th Cir. 1984)(per curiam); Ballard v. Spradley, 557 F.2d 476, 481 (5th Cir. 1977). And from what I have observed during my years on the district bench, the Marshals Service performs numerous tasks for members of the judiciary. Finally, this court has declared that "[i]n discharging his duties as a Marshal he acts concurrently as an officer of the federal judiciary and as an executive officer." United States v. Krapf, 285 F.2d 647, 649 (3d Cir. 1961).

I conclude, however, that these factors do not take the Marshals Service out of the executive branch of our government. The President appoints the United States Marshal for each judicial district, 28 U.S.C. § 561(a); and the

Attorney General supervises and directs the United States marshals in their performance of public duties, 28 U.S.C. § 569(c)(1976). Thus, while there is plainly a special relationship between the Marshals Service and the federal judiciary, the marshals formally remain part of the executive branch of our government. While I would feel considerably more comfortable with this result, were I able to discern the reasoning of McIntire and McClung in their apparent restrictions on federal mandamus power and thus to consider whether those reasons justified a limit on mandamus against federal marshals, on balance I agree with Judge Gibbons' conclusion that federal marshals are the beneficiaries of whatever limits there may be under 28 U.S.C. § 1651 on the issuance of writs of mandamus against federal executive officials.

II. The Need For Flexibility

My acceptance of the rigid historicism of the opinion announcing the judgment of the court is also hindered by my belief that, from a perspective of judicial administration, the flexibility and creativity exhibited by the magistrate in mediating the vexing financial problems of Pennsylvania and the United States is precisely what we should be encouraging. If the dead hand of precedent did not cabin my freedom of action, I would applaud the actions of the magistrate here.

It is important to explain why today's holding may hamper the ability of the federal courts to find facts accurately, particularly in prisoners' rights suits under 42 U.S.C. § 1983, which, for obvious reasons, frequently require invocation of the otherwise unusual writ of habeas corpus ad

testificandum. Cf. Harris v. Nelson, 394 U.S. 286 (1969)(expanding fact finding capacity of federal courts via section 1651 in habeas corpus proceeding brought by prisoner). Many such suits involve baseless claims and in many cases "ad testificandums" will be unnecessary. But where a district court or magistrate determines that the testimony of a state prisoner actually would assist a court or jury in its fact finding capacity, it should not be deterred from obtaining the prisoner because the state is unable to pay the full costs of witness production and because the similarly strapped Marshals Service is itself hard pressed to shoulder any such burden.

It may be said, of course, that the state assumes the costs of producing those it has chosen to incarcerate when federal authorities determine that temporary release of the prisoner is required

in order to vindicate federal rights. This court has recognized, however, that because states have compelling interests in incarcerating dangerous persons, the federal courts should consider the costs of production on a custodian before issuing writs of habeas corpus ad testificandum. See Jerry v. Franciso, 632 F.2d 252 (3d Cir. 1980)(per curiam). Yet, given (1) the requirement of Jerry v. Franciso that courts consider the costs to the state before issuing an ad testificandum; (2) the principle that issuance of an ad testificandum writ lies in the discretion of the trial court; and (3) financial realities, we fear that, faced with a holding that the court cannot exercise its discretion to order the Marshals and the state to share the costs of transportation, there may be cases in which the district courts may be impelled to exercise their discretion

to deny ad testificandum writs when a state is short of funds. Such denials will, at least in some instances, impair the vindication of civil rights.

III. Solutions

Several methods exist whereby the concerns expressed in parts I and II of this opinion can be treated and the difficulties I help create today can be ameliorated. The first would be for me to change my mind. I will confess to have wavered many times in the course of reviewing this appeal. Ultimately, however I cannot escape McClung, a decision of the Supreme Court, which no matter how antiquated, I am not free to overrule. The Supreme Court, by contrast, has far greater freedom and greater authority in interpreting its cases than do courts of appeal; it also may find that, because statutes can

adapt to fit the needs of changing times, the All Writs Act now permits what, in the time of McIntire and McClung it did not.[4] With a split in the circuits now existing, there is now all the more reason for Supreme Court review in this area.[5] Finally, of course, legislative action may provide for greater. flexibility than exists by virtue of our decision today. Congress may conclude that our interpretations of its prior commands has been erroneous or decide to issue new commands in light of changed circumstances. While I did not presume to tell Congress what result to

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[4]Alternatively, the Supreme Court may find that my interpretation of McClung is simply incorrect.

[5]Justice Rehnquist has already suggested the question before us today to be worthy of Supreme Court review. See California Department of Corrections v. United States, 104 S.Ct. 1425 (1984) (Rehnquist, J., dissenting from denial of certiorari).

reach, I do suggest that it is a problem, among any, worthy of its consideration.

ATKINS, District Judge, concurring in part and dissenting in part.

I concur in Part I and Part II.B. of Judge Gibbons' opinion. However, because I agree with the decisions of the Fifth and Eleventh Circuits in Ballard v. Spradley, 557 F.2d 476 (5th Cir. 1977) and Ford v. Allen, 728, F.2d 1369 (11th Cir. 1984) (per curiam), and with the Ninth Circuit in Wiggins v. County of Alameda, 717 F.2d 466 (9th Cir. 1983), cert. denied, 104 S.Ct. 1425 (1984), I respectfully dissent from the judgment.

A TRUE COPY

Teste:

Clerk of the United States Court
of Appeals for the Third Circuit

(A.O. U.S. Courts, G.M.C. Printing, Phila., Pa. 215-568-4264)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RICHARD GARLAND : CIVIL ACTION

v.

SHERIFF SULLIVAN, ET AL. : NO. 80-2350

MEMORANDUM AND ORDER

WILLIAM F. HALL, JR. FEBRUARY 10, 1983
UNITED STATES MAGISTRATE

On December 8, 1982 in response to the plaintiff's petition, I issued writs of habeas corpus ad testificandum ordering the custodians of the plaintiff and four of his proposed witnesses, all of whom are inmates in various state prisons here in Pennsylvania, to produce them for the trial of the plaintiff's case. The writs directed that the custodians were to transport the inmates from their present institutions to the county prison nearest to this courthouse and that the United States Marshal was

then to transport them from the county prison to the courthouse and maintain custody of them while they were in the courthouse for the trial and then transport them to the county prison when their appearance before the court was completed.

After the writs were issued the United States Marshals Service (the Marshal) moved to intervene and for reconsideration of my orders. I granted the motion to intervene and heard oral argument on the motion for reconsideration on January 19, 1983.

The Marshal objects to the order, insofar as it imposes a duty on him, on the grounds that:

1. Historically a writ has always been directed to the custodian of the prisoner sought, thus encumbering that custodian with the sole responsibility of producing his prisoner before

the tribunal seeking him and maintaining custody over him until he has completed his testimony;

2. The past practices of the Eastern District of Pennsylvania with regard to the production of state prisoners before the district court in their private civil rights actions have never heretofor involved any participation or support of the Marshal;

3. There is no statutory authority which allows the Marshal to expend manpower or monies in support of producing state prisoners to federal court in private civil rights actions.

This Circuit recently, in Story v. Robinson, 689 F.2d 1176 (3d Cir. 1982), considered the propriety of the Marshal's participation in transporting and maintaining custody of state prisoners in a civil rights action. In Story, the court affirmed an order imposing

duties upon the Marshal identical to those required by the orders in this case, insofar as it concerns his responsibility for the custody of state prisoners while in the courthouse. The court held that 28 U.S.C. §569(a), prescribing the duties of the Marshal generally:

> [Q]uite clearly authorizes the district court to require the attendance of the Marshal at any judicial proceeding, including any proceeding at which the testimony of a state prisoner may be required. It seems plain, then, that the court has authority to direct the Marshal to take prisoner witnesses into custody during the time their attendance at court is required.

At p. 1180. However, because the Marshal did not file a cross-appeal, the court did not decide whether Section 569(a) authorizes an order requiring the Marshal to take a prisoner witness into custody outside the courthouse. I conclude, therefore, that so much of the order as directs the Marshal to take Custody of the plaintiff and his witnesses during

the time of their attendance in court in this matter is clearly authorized by Section 569(a), and I will not amend the order in that respect. However, further review of that part of the order which requires the Marshal to take custody of the prisoners at a place outside of the courthouse is necessary.

While the historical practice in the Easaern District of Pennsylvania and federal courts generally may warrant consideration, neither history nor the past practices in this District, as they relate to the production of state prisoners in federal courts, in my view, constitute a legal prohibition against apportioning the responsibility for producing the plaintiff and his witnesses between the Commonwealth of Pennsylvania and the Marshal. Although couched in terms of historical practice, the Marshal's objections to his participation

in this process do, however, raise the question of whether there is legal authority for the court to order his participation in the transportation of state prisoners to the full extent required here.

In the exercise of the court's undisputed authority to issue writs of habeas corpus ad testificandum,[1] the order in question directs the Commonwealth to surrender custody of the plaintiff and his witnesses to federal authorities for the limited purpose of their court appearance. In the exercise of that general authority I have directed the Marshal to execute an order upon him ancillary to the command of the writ of habeas corpus ad testificandum and necessary for the production of the

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[1] 28 U.S.C. §2241(c)(5); Ballard v. Spradley, 557 F.2d 476, 480 (5th Cir. 1977); Story v. Robinson, 689 F.2d 1176, 1178 (3d Cir. 1982).

plaintiff and his witnesses in this court. The authority to impose these responsibilities upon the Marshal, ancillary to the production of these prisoners by the Commonwealth pursuant to the writ, is clearly provided for by 28 U.S.C. § 569(b),[2] which provides that United States Marshals shall execute all lawful writs and orders issued under the authority of the United States. Clearly the plain meaning of the language of Section 569(b) supports that conclusion, and other courts have reached the same result in the face of similar objections raised by the Marshal. Ballard v. Spradley, 557 F.2d 476 (5th Cir. 1977); Story v. Robinson, 531 F.Supp.

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[2] Subsection (b) provides:

United States marshals shall execute all lawful writs, process and orders issued under authority of the United States, including those of the courts and government of the Canal Zone, and command all necessary assistance to execute their duties.

627 (W.D. Pa. 1982)(Chief Judge Weber). Indeed, in Ballard v. Spradley, in concluding that the Marshal could be ordered to transport state prisoners, as witnesses in civil actions, from a local jail to the courthouse, the court upheld the order as being authorized by Section 569(b), and observed that the raison d'etre of the Marshals Service is to serve the federal forum in civil as well as criminal litigation. At p. 480. Similarly, in United States ex rel. Brown v. Malcolm, 350 F.Supp. 496, 498 (E.D.N.Y. 1972) the court concluded that it was the mandatory duty of the Marshal, pursuant to Section 569(b), to execute a writ of habeas corpus ad prosequendum issued by the District Court of Louisiana ordering New York State authorities to surrender a state prisoner to The Marshal who received temporary custody of him so that he could be brought by the Marshal

to Louisiana for sentencing and then returned to New York. In Ford v. Carballo, 577 F.2d 404 (1977) the Seventh Circuit also found authority in Section 569(b) for a federal district court's issuance of a writ of habeas corpus ad testificandum directing both the Marshal and the Warden of a state prison to produce a state prisoner for a federal civil proceeding. Ultimately at issue was the question of whether state authorities should be reimbursed for part of their expenditures insofar as the Marshal had failed to cooperate in the production of the prisoner. The court noted that the Marshal did not have the discretion not to participate in producing the prisoner, in spite of the pendency of his motion to modify the writ. The court concluded that the fact that a controversy may have existed over who should actually transport and suffer

the expense of producing the prisoner had no effect on the existing writ and did not authorize the Marshal to independently disregard a direct order of the court. At p. 407. Based on the foregoing, I conclude that legal authority exists for the order insofar as it directs that the Marshal take custody of prisoner witnesses at a point outside the courthouse.

In objecting to the order, the Marshal also argues that it cannot undertake the required transportation of state prisoners because there is no legal authority for it to make the necessary expenditure of funds. I do not agree with that contention because the authority for this expenditure is provided by 28 U.S.C. §567 which provides that, under regulations prescribed by the Attorney General, each United States Marshal shall be allowed the expense of transporting

prisoners, including the cost of necessary guards and the travel and subsistence expense of prisoners and guards. The United States Marshals are also authorized to pay their own travel and per diem allowances and that of their deputies and clerical assistants. 28 U.S.C. §571. In addition, authority for the expenditures in question is provided by 28 C.F.R. §0.111(b), which numbers among the authorized activities of the Marshal the execution of lawful writs and court orders pursuant to Section 569(b). See Ballard v. Spradley, supra, at 481. I conclude, therefore, that authority exists for the Marshal to make any expenditures which may be necessitated by his execution of the order.

Because, as the Marshal contends, the order appears to be at variance with the prior practice in this court, an explanation is in order, beyond the

consideration of legal authority. In his opinion in Story v. Robinson, 531 F.Supp. 627 (1982), Chief Judge Weber observed that during the past decade federal courts have experienced a dramatic increase in prisoner civil rights case filings, in many of which cases the prisoners are granted leave to proceed in forma pauperis. He noted that as the volume and costs of such litigation have increased, placing greater burdens on limited judicial resources, there has been a growing reluctance by governmental agencies to assume responsibility for providing services necessary to administer justice efficiently. After discussing the propriety of alternatives to the actual production of prisoners in court as witnesses in their civil rights actions, he concluded that where their appearance in nevertheless necessary, a fair and equitable result

would be achieved by the allocation between state and federal authorities of the responsibility for the costs associated with the execution of a writ of habeas corpus ad testificandum. These considerations, as well as circumstances peculiar to this case, led to my issuance of an order which apportioned the responsibilities for producing the plaintiff and his witnesses, even though my doing so may be a departure from prior practice in this court.

In this case the plaintiff is an inmate at the State Correctional Institution at Huntingdon. One of the witnesses to be produced is an inmate at the State Correctional Institution at Rockview, another one is at the State Correctional Institution at Dallas, and another is an inmate at the Holmesburg Prison in Philadelphia. The financial burden imposed upon the Commonwealth by the requirement

that it transport the prisoners from and to Huntingdon, Rockview and Dallas, all considerable distances from Philadelphia, will be significant, but is justified when the interest of the plaintiff in being present at the trial with his witnesses is weighed against the interest of the Commonwealth in maintaining them in confinement, as I explained in the memorandum accompanying the orders. However, an equitable and reasonable limitation of the costs incurred by the Commonwealth will be accomplished by having it transport the prisoners from these various distant institutions to the central location of the Philadelphia Detention Center[3] which is relatively

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[3]The Deputy Attorney General for the Commonwealth has advised the court that the Philadelphia Detention Center has been designated as the county jail nearest the courthouse to which the prisoners will be transported.

close to this courthouse. It is also equitable to apportion to the Marshal the responsibility for the transportation of the prisoners between the Philadelphia Detention Center and the courthouse, particularly given the practice of the Marshal of making frequent trips to and from that facility. Those trips are made by the Marshal because the Philadelphia Detention Center also serves as a facility where federal prisoners are frequently housed during their trials in this court, pursuant to an agreement between the Marshal and authorities of that institution.

I have further considered alternatives to the transportation of the inmates for a jury trial in this court, such as those enumerated by Chief Judge Weber in Story v. Robinson, at

pages 629, 630, as means of reducing the administrative costs in the adjudication of this matter while maintaining the highest standards of fairness and impartiality for the litigants, and as constituting less burdensome methods for obtaining the prisoners' testimony. In exploring these alternatives I was greatly aided by the General Counsel for the Marshal and by the Deputy Attorney General of the Commonwealth at the oral argument on the Marshal's motion and thereafter. Their sincere efforts facilitated the consideration of other procedures for obtaining the prisoners' testimony, none of which, however, is without prejudice to the interests of either the litigants, the Commonwealth of Pennsylvania, or the Marshal, or necessarily less burdensome than the means selected. Accordingly, with the exception of the order as it relates to

the prisoner at Holmesburg Prison, Larry Harris, the Marshal's motion for reconsideration is denied.

Larry Harris, who was an eyewitness to the acts complained of by the plaintiff, has apparently previously testified to these events during the plaintiff's trial on criminal charges which resulted in his being in the custody of the defendants. Counsel for the defendants contend that the transportation of prisoner Harris to court presents an unusual security risk in that on one occasion he "has already escaped from Holmesburg and was chased all the way to Center City by one of the prison guards."[4] Accepting counsel's

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[4]P.2, n.1 defendant's Memorandum in Opposition to plaintiff's Motion for Reconsideration of the court's order dated December 8, 1982.

The plaintiff's motion objected to the court's limitation on the number of witnesses ordered to be produced. The plaintiff's motion will be addressed in a subsequent memorandum and order.

assessment of the security risk as accurate, I considered alternative means of presenting the testimony of Mr. Harris, including the use of that portion of the trial transcript which contains his testimony about the incidents in question. Acting in the interest of her client, counsel has rejected that proposal as an acceptable alternative. In devising a solution to the problem of obtaining the testimony of Mr. Harris without prejudice to the litigants, I recognize the importance of his testimony to the plaintiff's attempt to prove allegations raising serious constitutional claims, and the difficulties in the presentation of his case which the plaintiff faces as an indigent prisoner, proceeding pro se. For these reasons I conclude that it is appropriate that the deposition of Larry Harris be taken at Holmesburg Prison by the

plaintiff's advisory counsel at the defendant's expense. Haymes v. Smith, 73 F.R.D. 572, 574-575 (W.D.N.Y. 1976).[5]

An implementing order is attached hereto.

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[5]As a further clarification of the matter, my previous order was not intended to require that Larry Harris be transferred to the Philadelphia Detention Center. He may remain housed at Holmesburg Prison where his deposition is to be taken.

IN THE UNITED SSTATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RICHARD GARLAND : CIVIL ACTION

v.

SHERIFF SULLIVAN, ET AL. : NO. 80-2350

O R D E R

AND NOW, this day of February, 1983, the Motion of the United States Marshals Service for reconsideration of the court's orders of December 8, 1982 is DENIED, except with regard to the order of December 8, 1982 directing the production of Larry Harris, an inmate at Holmesburg Prison, which order is hereby VACATED in accordance with the attached memorandum.

BY THE COURT:

WILLIAM F. HALL, JR.
UNITED STATES MAGISTRATE